ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

BellSouth Telecommunications, Inc.	)	
Petition for Forbearance	)	**WC Docket No. 04-48**
Under 47 U.S.C. § 160(c)	)	
	)	

PETITION FOR FORBEARANCE

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PETITION FOR FORBEARANCE

I. Introduction and Summary

Pursuant to 47 U S C § 160 (c) and 47 C.F.R. § 1.53, BellSouth Telecommunications, Inc. ("BellSouth") requests that to the extent the Commission determines § 271(c)(2)(B) to impose the same unbundling obligations on BOCs as established by § 251(c) that the Commission forbear from applying any stand-alone unbundling obligations on broadband elements. While BellSouth believes that no such obligations exist, it files this Petition in an abundance of caution to ensure that the Commission does not impose such obligations where there is ample evidence to demonstrate that the unbundling obligations required by § 251 are unnecessary to meet the purposes of § 271 Through this Petition, BellSouth is seeking the same relief requested by Verizon in its Petition for Forbearance filed October 24, 2003.[1]

[1] *See* Letter from Susanne A. Guyer, Senior Vice President, Federal Regulatory Affairs, Verizon, to Chairman Michael Powell, Commissioner Kathleen Abernathy, Commissioner Kevin Martin, Commissioner Michael Copps and Commissioner Jonathan Adelstein, CC Docket No. 01-338 (filed Oct. 24, 2003), and *Commission Establishes Comment Cycle for New Verizon Petition Requesting Forbearance from Application of Section 271*, CC Docket No. 01-338, *Public Notice*, FCC 03-263 (rel. Oct. 27, 2003) (noting that the Verizon October 24 letter will be treated as a new forbearance petition and establishing comment cycle for same).

In the *Triennial Review Order*,[2] the Commission, pursuant to its obligations under § 251(d)(2), established an impairment analysis to determine when an incumbent local exchange carrier ("ILEC") must provide access to an unbundled network element ("UNE"). Through this analysis, once a competitive local exchange carrier ("CLEC") is no longer impaired without access to the network element, the ILEC no longer has an obligation to provide access to the element on an unbundled basis. In the same *Order*, however, the Commission indicated that § 271 of the Act establishes an independent unbundling obligation on ILECs to provide unbundled access to network elements, even where the Commission has found that access to such elements is no longer necessary under the statutory impairment standard. This position cannot be reconciled with the other portions of the *Triennial Review Order* or the Commission's own decisions under § 271 or in the context of the D.C. Circuit's decision in *USTA*.[3]

BellSouth believes any language in the *Triennial Review Order* that could be conceived as establishing an independent § 251-type unbundling obligation under § 271 is incorrect and filed a Petition for Reconsideration ("PFR") of this matter.[4] BellSouth is confident that the Commission will clarify its finding on this matter and find that once an UNE is removed from the list of UNEs that an ILEC must provide, then the ILEC is also free from unbundling obligations, if any, that exist under § 271. Regardless of when the Commission rules on

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[2] In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket Nos. 01-338, 96-98 & 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) ("Triennial Review Order" or "TRO")

[3] *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA*").

[4] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.*, CC Docket No 01-338, *et al.*, BellSouth Petition for Clarification and/or Partial Reconsideration (filed Oct 2, 2003)

BellSouth's PFR, or even if it retains its initial decision in the *TRO*, the Commission should forbear from applying unbundling obligations, if any, that an ILEC has under § 271. ILECs should have no stand-alone unbundling obligation for broadband network elements that no longer meets the § 251(d)(2) standard, as determined by the Commission in the *Triennial Review Order* or any subsequent review order [5]

As the Commission recognized in the *Triennial Review Order*, "broadband deployment is a critical policy objective that is necessary to ensure that consumers are able to fully reap the benefits of the information age."[6] To assure that this objective is realized, the Commission decided to "refrain from unbundling incumbent LEC next-generation networks,"[7] explaining that "applying section 251(c) unbundling obligations to these next-generation network elements would blunt the deployment of advanced telecommunications infrastructure by incumbent LECs and the incentive for competitive LECs to invest in their own facilities, in direct opposition to the express statutory goals authorized in section 706."[8]

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[5] BellSouth does not believe that § 271 places any unbundling obligations on RBOCs over what the RBOCs offer through their tariffed wholesale services. Section 271 is very specific regarding the elements that a BOC must provide unbundled from other elements. There is no broad "any technically feasible point" standard. For example, in checklist item 4 the statute specifically states that access is limited to a "local loop transmission from the central office to the customer's premises, unbundled from local switching or other services." This specific access element cannot be expanded to include all of the sub-loop elements that the Commission requires under § 251. Any attempt by the Commission to impose § 251-type unbundling obligations on BOCs would be an extension of the "terms used in the competitive checklist." *See* 47 U.S.C. § 271(d)(4) Without waiving any rights regarding this position, BellSouth files this Petition seeking forbearance from any § 251-type unbundling obligations the Commission appears to indicate RBOCs may have.

[6] *Triennial Review Order*, 18 FCC Rcd at 17125, ¶ 241.

[7] *Id* at 17141, ¶ 272.

[8] *Id* at 17149, ¶ 288; *see also id* at 17145, 17150, 17323, ¶¶ 278 (excluding fiber to the home from unbundling "will promote [the] deployment of the network infrastructure necessary

All of the policy reasons that led to the sound conclusion not to require unbundling of broadband in the § 251 context compel the Commission to forbear from unbundling obligations, if any, that the Commission considers to be required under § 271. The Commission could not rationally conclude that unbundling under § 251 would "blunt the deployment of advanced telecommunications infrastructure," but that unbundling under § 271 would not have this pernicious effect. Any forced unbundling at potentially regulated rates would undermine incentives to deploy next-generation networks by forcing the BOC to share with its competitors the potential benefits of a risky investment. Moreover, such compulsory unbundling would force BOCs to redesign their networks in order to accommodate requests from competitors for individual piece-parts. Such re-design imposes considerable inefficiencies and added costs, precluding the BOC, which, like all competitors, has a finite supply of capital, from deploying broadband as extensively and efficiently as it otherwise could.

Broadband services are provided in a highly competitive market, and access arrangements should be left to commercial negotiations in order to assure that all providers operate according to appropriate economic incentives which in turn will result in consumers reaping the benefits of the "race to build next generation networks and the increased competition in the delivery of broadband services"[9] that the Commission sought to unleash by excluding broadband from unbundling. The Commission should therefore forbear from applying unbundling obligations, if any, that apply to facilities – especially broadband facilities – under § 271 where such facilities have been delisted under § 251.

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to provide broadband services to the mass market"), 290 (limiting the unbundling obligation for hybrid loops "promotes our section 706 goals"), 541 (same for packet switching).

[9] *Id.* at 17142, ¶ 272.

Interpreting § 271 unbundling to be the same as unbundling under § 251 flies in the face of applicable case law as well as statutory construction. In *USTA*, the D. C. Circuit held that unbundling should not be required in the absence of impairment because "[e]ach unbundling of an element imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities."[10] Moreover, the court explained that Congress did not wish to perpetuate the "completely synthetic competition"[11] resulting from overbroad reliance on UNEs Requiring that BOCs provide unbundling in perpetuity under § 271 defies the Act's deregulatory imperative; overrides Congress' and the Supreme Court's direction that access to unbundled elements should be subject to limits; and blatantly disserves the Act's fundamental goal of promoting facilities-based competition.

Clearly, § 271 cannot be read to require unbundling in perpetuity. It is nonsensical to suggest that Congress, recognizing the harmful effect of unbundling on investment, would have imposed strict limits on forced access to UNEs in the provision that establishes the unbundling obligation, only to exclude carriers serving more than 80 percent of the nation's access lines from those limits in another section of the Act Although the Commission suggests that disparate treatment of the BOCs is not illogical because § 271 reflects Congress' finding that the BOCs should face additional hurdles before being allowed to provide interLATA services, that rationale cannot support a requirement of perpetual unbundling. Section 271 should be read to give meaning to all the subparts of that section. A better reading of § 271 – one that acknowledges the fact that items 4-6 and 10 must have meaning separate from item 2, but does not do violence to the statute – is that the former checklist items reflect Congress' minimum

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10 *USTA*, 290 F.3d at 427.

11 *Id.* at 424.

expectations at the time the Act was passed, in case § 271 applications were filed before the Commission adopted rules implementing § 251. Unlike the logic in the *Triennial Review Order*, that interpretation respects cardinal principles of statutory construction by furthering rather than undermining, Congress' intent.

For these reasons the Commission should grant BellSouth's PFR and eliminate any indication that § 251-type unbundling obligations are required under § 271. As BellSouth explained in its PFR, this decision is wrong and cannot be squared with the findings of *Triennial Review Order*, especially as it relates to broadband If the Commission does not amend its decision in the *Triennial Review Order*, it must, pursuant to its obligations under the forbearance statute, forbear from applying § 251-type unbundling obligations for broadband elements, if any, under § 271. The factors of § 10 are met; the Commission must forbear from applying such unbundling obligations.

II. The Commission Should Forbear from Requiring Unbundling Under § 271 of Elements Delisted Under § 251

Section 10 of the Communications Act of 1934 provides that the Commission "shall forbear from applying any regulation or any provision of," the Communications Act "to a telecommunications carrier or telecommunications service," if "(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary for the protection of consumers, and (3) forbearance from applying such provision or regulation is consistent with the public interest."[12]

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[12] 47 U S C. § 160(a).

There can be no question that these three tests have been met regarding unbundling requirements in § 271 where the Commission has found a CLEC no longer to be impaired without access to that element pursuant to § 251(c). Any other finding cannot be squared with the statute

III. The Conditions of § 160(c) Are Satisfied

A. Continued § 251-Type Unbundling Obligations Under § 271 Are Not Necessary to Ensure That Charges, Practices, Classifications, or Regulations are Just and Reasonable and Are Not Unjustly or Unreasonably Discriminatory

There is no need to require § 251-type unbundling obligations through § 271 in order to ensure that charges, practices, classifications, or regulations are just and reasonable and are not unjustly or unreasonably discriminatory. The Commission's determination that CLECs are not impaired without access to a network element, and, thus, unbundling is not required under § 251, concludes that the provision of that element is competitive. This was recognized by the Commission[13] and the D.C Circuit in the *USTA* decision.[14] Once the provision of an element is competitive, there can be no argument that continued unbundling of that element is necessary in order for a competitor to provide a telecommunications service using that element.

B. Continued § 251-Type Unbundling Obligations are Not Necessary for the Protection of Consumers

Clearly, once a competitor is no longer deemed to be impaired without access to an element, unbundling is not necessary "for the protection of consumers." The fact that a CLEC is not impaired without access to an element fully demonstrates that consumers are protected by

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[13] *See Triennial Review Order*, 18 FCC Rcd at 17035, ¶ 84 (the conclusion that CLECs are not impaired without access to a network element reflects the Commission's determination that "lack of access" to that element does not "pose[] a barrier or barriers to entry . . . likely to make entry into a market uneconomic").

[14] The Court found that a Commission conclusion that CLECs are not impaired without access to a network element reflects the Commission's determination that the element is capable of "competitive supply." *USTA*, 290 F 3d at 427.

competition Forced unbundling when there is no impairment, however, has very damaging affects on consumers through neglected investment. If CLECs are allowed to obtain § 251-type unbundling of elements without impairment, then the incentive for all carriers to innovate and to deploy new facilities will be significantly reduced.[15] Indeed, the Commission recognized this very point in finding that CLECs were not impaired in next-generation network elements and, thus, declined to unbundle them under § 251 To the extent unbundling obligations exist under § 271, the same analysis applies. More importantly, consumers will benefit from the rivalry and competition among facilities-based competitors that would otherwise be muted by continued unbundling.

C. Forbearance from Applying Continued § 251-Type Unbundling Obligations is Consistent with the Public Interest

Forbearance from § 251-type unbundling obligations under § 271 is consistent with the public interest when CLECs are no longer impaired without access to an element. Section 10 provides that in making the determination under subsection (a)(3), the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the

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[15] *See Triennial Review Order*, 18 FCC Rcd at 17141, ¶ 272 ("[t]hus, we conclude that relieving incumbent LECs from unbundling requirements for [fiber and packet-based] networks will promote investment in, and deployment of, next-generation networks ").

public interest.[16] As discussed above, a determination that a CLEC is no longer impaired for an element under § 251 means that the market for that element is competitive

The D C Circuit found that the Act does not provide the Commission "a license . . . to inflict on the economy" the costs of unbundling "under conditions where it had no reason to think doing so would bring on a significant enhancement of competition."[17] Just as the Act does not provide the Commission a license to impose unbundling costs under § 251, it equally does not have such a license under § 271. Indeed, it would completely contradict the court's finding for the Commission to conclude that a CLEC is no longer impaired without access to an element under § 251, thus finding that the element is being provided on a competitive basis, yet find that there would continue to be a "significant enhancement to competition" to continue to require the element to be unbundled under § 271. These conclusions are mutually exclusive and would lead to excessive unbundling that the court warned against [18]

Accordingly, continued § 251-type unbundling under § 271 will produce the same ill effects of "disincentives to research and development by both ILECs and CLECs and the tangled management inherent in shared use of a common resource"[19] and create "synthetic competition"[20] In light of the Court's clear findings in *USTA*, application of § 271 unbundling would plainly be contrary to the public interest.

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16 47 U.S C. § 160(b)

17 *USTA*, 290 F.3d at 429.

18 *Id* (as the Supreme Court recognized in *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 428-29 (1999), "unbundling is not an unqualified good").

19 *Id*

20 *Id* at 424.

That is especially true considering the Commission' obligation to consider whether forbearance would "promote competitive market conditions."[21] Any regulatory regime that distorts the incentive to invest in new facilities because of the ability of competitors to obtain those facilities on an unbundled basis does not promote competition within that market. When CLECs are not impaired without access to a particular element, forced unbundling of that element will not "bring on a significant enhancement of competition," and will instead undermine competitive market conditions. Considering this outcome, forbearance of § 271 unbundling obligations, if any, is consistent with the public interest.

D. The Requirements of § 271 Have Been Fully Implemented

Section 10 provides that the Commission may not forbear from applying the requirements of § 251(c) or § 271 until it determines that those requirements have been fully implemented.[22] The best reading of the Act is that "fully implemented" should be read consistently with the use of the same term in § 271(d): a provision of the Act has been "fully implemented" once the Commission determines that a BOC has met the criteria for grant of its § 271 applications[23] and the Commission has determined not to impose the particular unbundling obligation under § 251(d)(2). The Commission cannot find that BellSouth has fully implemented § 271 for approval purposes in obtaining interLATA relief but has not "fully implemented" § 271 for forbearance purposes. Because BellSouth now has obtained § 271 authority throughout its

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21 47 U S C. § 160(b).

22 47 U S.C. § 160(d).

23 47 U.S C § 271(d)(3)(A)(i)

region, it must be considered to have "fully implemented" the requirements of § 271 in its entire nine (9) state service territory [24]

Respectfully submitted,

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Dated March 1, 2004

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[24] *In the Matter of Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., And BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Georgia and Louisiana,* CC Docket No. 02-35, *Memorandum Opinion and Order*, 17 FCC Rcd 9018 (2002), *In the Matter of Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., And BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina, and South Carolina,* WC Docket No. 02-150, *Memorandum Opinion and Order*, 17 FCC Rcd 17595 (2002); *In the Matter of Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Authorization To Provide In-Region, InterLATA Services in Florida and Tennessee.* WC Docket No. 02-307, *Memorandum Opinion and Order*, 17 FCC Rcd 25828 (2002)

CERTIFICATE OF SERVICE

I do hereby certify that I have this 1st day of March 2004 served a copy of the foregoing **Petition for Forbearance** via hand delivery or electronic mail to the following parties:

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